No. 83-1628

In The

Supreme Court of the United States

October Term, 1983

DR. HERBERT M. SHELTON, ET AL.,
Petitioners,

vs.

JOAN F. CARLTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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April 25, 1984

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RESPONSE TO QUESTIONS PRESENTED

1. The Court of Appeals' decision does not prohibit a person from selecting a course of treatment not sanctioned by orthodox medical opinion.

2. The Court of Appeals' decision does not prohibit Petitioners from engaging in a course of treatment not sanctioned by orthodox medical opinion.

3. There was sufficient evdence presented that Dr. Vetrano did recommend an extended fast for the treatment of William R. Carlton's ulcerative colitis and the Court of Appeals was correct in holding that Dr. Vetrano made that fatal recommendation.

4. The Court of Appeals did not hold the Defendants to the standard of care of medical practitioners.

5. There is more than ample evidence to support the verdict and judgment of negligence, both ordinary and gross, and the Court of Appeals' decision is supported by the great weight and preponderance of that evidence.

6. The Court of Appeals correctly held that the evidence of prior, related and substantially similar "fingerprint deaths" was admissible under the Federal Rules in a negligence case.

PARTIES BEFORE THE FIFTH CIRCUIT

The parties to the proceeding in the Fifth Circuit were the following:

Dr. Herbert M. Shelton

Dr. Vivian Vetrano

Joan F. Carlton, Individually and as Representative of the Estate of William R. Carlton, and as Next Friend of Robert Carlton, Melissa Carlton, David Carlton, and Lynn Carlton.

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RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Supreme Court of the United States:

Joan F. Carlton, Individually and as Representative of the Estate of William R. Carlton, Deceased and as Next Friend of Melissa Carlton, Robert Carlton, David Carlton, and Lynn Carlton, pray that the Petition for a Certiorari to Review the Judgment of the United States Court of Appeals for the Fifth Circuit 722 F.2d 203 filed in the above entitled case on January 3, 1984, be denied.

OPINIONS BELOW

Petitioners accurately state the status of the opinions below in their Petition for a Writ of Certiorari.

JURISDICTION

The Judgment of the Fifth Circuit was filed on January 3, 1984. The jurisdiction of this Court has been invoked under 28 USC & 1254(1). The basis of the District Court's jurisdiction was 28 USC & 1332(a). The petition for certiorari should be denied in accordance with S. Ct. R. 17.

FEDERAL RULES INVOLVED:

Rule 403, Federal Rules of Evidence:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 (b), Federal Rules of Evidence:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to show the character of a person in order to show that he acted in conformity therewith. It may be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 51, Federal Rules of Civil Procedure:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 17, Rules of the Supreme Court:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

PRELIMINARY STATEMENT

This is an action brought by the widow and children of William R. Carlton for the wrongful death of their husband and father. This case presents a novel method of health care. However, the issues of negligence and gross negligence were not decided against the Defendants, Shelton and Vetrano, for their decision to practice this unusual therapy but for their complete failure to exercise the basic standard of care of the reasonable ordinary prudent person in regards to the rights of the Decedent, William R. Carlton.

This cause of action was presented to the jury without any requested issues by the Defendants in regard to the now alleged contributory negligence of Carlton nor were any instructions requested for submission to the jury on the issue of assumption of the risk which was first raised by the Defendants' appeal.

The fundamental issue presented in the case was whether the Defendants or any person could be excused for withholding proper medical attention until such time

as medical aid becomes ineffective, particularly when three other unfortunate persons had succumbed under similar conditions in the preceding five year period under Defendants' supervision.

William R. Carlton had not made a "decision" to die. That decision was made by Dr. Vetrano when Carlton's mind and body had reached such a deplorable state that he no longer possessed the mental ability to reason and no longer possessed the physical ability to carry out any course of saving action.

The Judgment in this case is based on a wealth of supportive evidence. A right and fair result was reached by respected lower court judges. The complete lack of any case authority regarding the standard of care of "fasting practitioners" indicates the problem is unlikely to occur frequently. Furthermore, since the reasonable man standard in regards to Defendants' care was submitted to the jury with the approval of all trial counsel, the rule sought by the Petitioners is not supported by this fact situation.

While the federal questions raised by the Petitioners present intellectually interesting problems, this Court does not sit for the benefit of Defendants to satisfy their interests but for special and important reasons which reach beyond the academic or the episodic.

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STATEMENT

Plaintiff was the wife of the Decedent and Lynn, Robert, Melissa, and David were his four (4) adopted children. (Tr. 1-22). William R. Carlton was forty-nine (49) years of age at the time of his death (Tr. 1-97), a graduate of the University of Rochester and held a Master's Degree in Business from the Wharton School of Finance. (Tr. 1-23, 24).

William Carlton was an employee of the Hewlett-Packard Company exercising the position of the Corporate Marketing Finance and Systems Manager. (Tr. 2-366). His fellow employees described William Carlton as possessing outstanding technical skills and having a "real good working attitude" as far as getting along with peer groups. (Tr. 2-367, 368). Prior to entering the Health School, Carlton had accepted a promotion to become comptroller of the company's leasing division and would have enjoyed a salary of $56,000.00 a year. (Tr. 2-367, 368).

In 1968, Decedent was diagnosed as having ulcerative colitis. (Tr. 1-31). The condition, manifested by ulcers in the colon, was not painful, though it became quite a nuisance and required Carlton to make frequent trips to relieve himself. (Tr. 1-32). However, the colitis did not interfere in Carlton's enjoyment of life, particularly outdoor activities. (Tr. 1-97, 2-357).

When drug therapy failed to correct the colitis, Carlton's physician recommended a complete colostomy, a surgical procedure in which the colon is removed. (Tr. 1-33). The need for surgery was not critical. However, due to its irreversible nature, Carlton and his wife wanted to explore all alternatives. (Tr. 1-34). They were introduced to the

"Hygenic" way of thinking which advocated complete fasting for the treatment of the disease. If the fast was unsuccessful, then there was the option of the colostomy. As Mrs. Carlton testified:

> "We had been introduced to the natural health hygiene way of thinking and possibly of undertaking a fast to allow the body to rest and cure itself, and we thought that was a viable alternative to the operation because if it didn't work, we could always go ahead with the operation." (Tr. 1-35, lines 17-22).

The Carltons read several books by Dr. Herbert M. Shelton. (Tr. 1-38). The books were devoid of any dangers of death resulting from a fast as long as the fasting supervisor exercised good common sense. (Tr. 1-38, 39, Plaintiffs' Exhibit No. 32). Nor did Dr. Vetrano ever mention to the Carltons the susceptibility of the human body to pneumonia as a result of a debilitating fast, or the fact that death had occurred as a result of fasting at the Shelton Health School. (Tr. 1-38, 39).

On Dr. Vetrano's recommendation, Carlton stopped his drug therapy and came to San Antonio to begin a fast consisting solely of distilled water intake. (Plaintiffs' Exhibit No. 3, Tr. 1-43). William Carlton entered the Health School weighing 190 to 192 pounds. (Tr. 1-45).

On October 10, 1978, 29 days later, William Carlton was brought to Baptist Memorial Hospital in an extremely weak, debilitated, and dehydrated condition, so weak that he could not sit up and become exhausted by simply moving his hands. (Tr. 1-168, 170, 175, 197, 252, 253, 261). Chest X-rays indicated that Carlton was also suffering from aspiration pneumonitis indicating that several days prior to his admission, he had become so weak that he was

inhaling his own saliva and vomitus, severely infecting his lungs. (Tr. 1-190, 244, 267). For at least four (4) days prior to his admission into Baptist Memorial Hospital, Carlton had been unable to get out of bed. (Tr. 1-261).

In the words of Dr. Vincent Di Maio, Carlton's chances for survival were slim:

> "When he came in, he was in very serious and critical condition. His blood tests revealed that the constituents of his blood were such that he was sort of, I guess you would say, balanced on a knife's edge. . . . If he had died five minutes after admission, I would not have been surprised in the least." (Tr. 2-419, lines 17-24).

Less than 24 hours after admission, Carlton was dead due to debilitation, dehydration, malnutrition, and aspiration bronchial pneumonia. (Tr. 2-374). His weight at autopsy was 130 pounds. (See Plaintiffs' Exhibit No. 17).

Carlton had not eaten anything at the Health School the entire 29 days he was under the supervision of Dr. Vetrano. (Tr. 3-796). While Dr. Vetrano was licensed as a chiropractor by the State of Texas, her "treatment" by prolonged fasting was not in accordance with the laws of the State of Texas nor with her studies as a chiropractor. (Tr. 2-296).

Dr. Charles Downing, a licensed chiropractor and past president of Texas Chiropractic Association and Texas State Director for the American Chiropractic Association, testified that it was beneath the standard of care for a reasonable chiropractor to recommend a diet consisting of a sole intake of distilled water for the treatment of ulcerative colitis. (Tr. 2-296, 2-317).

Five medical doctors testified that on a medical standard, Dr. Vetrano's actions were not only negligent, but constituted gross neglect. (Tr. 1-236, 1-239, 1-241, 1-259, 1-260, 2-421-2-423, 2-469-2-470). Furthermore, in the course of her "practice", Dr. Vetrano had seen at least three other individuals die as a result of dehydration, starvation, and disease, at Dr. Shelton's Health School, and two of these three ill-fated patients had aspiration pneumonitis at the time of their death. William R. Carlton suffered from all of these conditions. (Tr. 2-407-2-409).

Defendant, Dr. Herbert M. Shelton, while bedridden with Parkinson's Disease, was completely lucid at all times material herein, and consistently advised Dr. Vetrano in regards to the operations of the Health School. Furthermore, Dr. Shelton maintained complete veto power over the operations of the Health Center. (Tr. 3-849-850, 3-855-857, 3-868).

Defendants' expert, Dr. Scott, a fasting practitioner from Ohio, stated that patients must be seen at least once a day during a fast and notes must be recorded following each observation. (Tr. 3-630, 3-671). According to Dr. Scott, patients who refuse to follow orders must be discharged. (Tr. 3-362). Finally, Dr. Scott testified that it is extremely important to note in the records when a patient refuses to break a fast. (Tr. 3-672). Dr. Vetrano's notes indicated that she was seeing Carlton every two to three days. She did not record any indication of a refusal by Mr. Carlton to break the fast. (Tr. 4-903, 4-919, 4-921).

Emmett Freez, Mr. Carlton's part-time roommate, was not a "disinterested witness" as claimed by Petition-

ers. He refused to talk to the Plaintiffs' counsel prior to the trial, because he believed that Plaintiffs wanted to build a case against Dr. Vetrano. (Tr. 3-734). On cross-examination, Emmett Freez admitted that he never heard Dr. Vetrano recommend that Mr. Carlton break his fast.

"Q. You never did hear her recommend that he break the fast, did you?

A. I didn't hear her recommend it, no." (Tr. 3-740, lines 24, 25; Tr. 3-741, line 1).

Nor was Emmett Freez Carlton's roommate during Carlton's final days at the Health School. Freez left the School on October 1, 1978. (Tr. 3-717). Carlton remained at the School until October 10, 1978. (Tr. 1-168-170).

Never did Dr. Herbert M. Shelton in his books, nor did Dr. Vetrano inform Mr. Carlton or his wife, of the possibility of death in fasts conducted at the Shelton Health Center. Defendants' expert fasting practitioner, Dr. Scott, testified that he does not inform his patients of the possibility of death. (Tr. 3-687). Furthermore, all witnesses at the trial who had engaged in a prolonged fast at some time in the past, stated that they were never advised of the possibility or the risk of death occurring during a fast, particularly at the Shelton Health Center. (Tr. 3-686, 3-762, 3-780, Pickle Depo. p. 22).

The opinion below clearly indicates that the Court of Appeals did correctly perceive the nature of the case. Dr. Vetrano did recommend a prolonged fast for the treatment of Mr. Carlton's condition. (Plaintiffs' Exhibit No. 3).

The record clearly reflects that while the Defendants carefully and deliberately avoided use of the term "medical facility" to describe their operation at the Shelton

Health Center, their persistence in using the title "doctor", their use of health questionnaires, doctor's notes, and physical examinations, gave the public, including Carlton, the impression that this was a "medical facility". This constant referral to one another as "doctor", despite the fact that prolonged fasting is not a sanctioned practice within the chiropractic field, is deliberately misleading to those unfamiliar with the Hygenic Program. Use of such terminology gives the illusion that during a fast, basic conditions will be monitored and proper and timely medical attention will be forthcoming in the event the need arises.

Respondents respectfully disagree with the Petitioners in that the correct posture of this case does not concern Carlton's decision to enter the Health School but the Defendants continuing the fast and withholding proper medical attention in that critical period prior to Mr. Carlton's death. As Dr. Vetrano's notes indicate, Mr. Carlton began having chest pains on October 7, 1978. By that time, Carlton had slipped into a mental fog and he had become too weak to stand. The Defendants' inaction during this period was the basis of the verdict and judgment of negligence and gross neglect. They failed to exercise the standard of care which would have been exercised by the ordinary prudent person under the same or similar circumstances, that is seek proper medical attention before it becomes too late. Dr. Vetrano *chose* to delay conventional medical treatment. She *chose* to retain Carlton, a man whose reasoning had become clouded, and his physical strength nearly extinguished, in a non-medical facility without testing or monitoring equipment at a time when Carlton was experiencing severe chest pains and

was suffering from malnutrition and dehydration. She, "the fasting supervisor", with the advice and consent of Dr. Shelton, allowed William R. Carlton to die. As set forth in the record, it was her decision to continue the fast despite Carlton's complaints of pain.

"Q. Haven't there been people that you have advised you are in a crisis, it will pass, and the person did not survive the crisis, they died?

A. Yes, I have had that. (Tr. 4-926, lines 20-23).

Q. I just want to know if you don't encourage crisis to be endured?

A. If I think the crisis should be endured, I encourage it. If I think it shouldn't, I break the fast.

Q. Alright, did anyone tell Mr. Carlton, 'you are in a crisis, this will pass, just endure it.'?

A. I told him that I thought he was passing gallstones. I feel that he did start passing gallstones and I said, let's watch it and see what it is." (Tr. 4-927, lines 9-17).

PROCEEDINGS BEFORE THE DISTRICT COURT

Petitioners have accurately stated the proceedings before the District Court.

PROCEEDINGS BEFORE THE FIFTH CIRCUIT

Petitioners have accurately stated the proceedings before the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Has Rendered a Decision In Accordance With Applicable State Law.

II.

The Court of Appeals Has Rendered a Decision In Accordance With the Federal Rules of Evidence.

III.

The Court of Appeals Has Not Rendered a Decision Which Will Inhibit Freedom of Choice, Research and Exploration.

ARGUMENT

I.

The Court of Appeals Has Rendered a Decision In Accordance With Applicable State Law.

Petitioners are correct in that it is Respondents' position that there are no substantial federal questions presented in this case. While a decision involving a starvation clinic may be novel and thus intellectually interesting, the questions presented are unique to these Defendants and are in no way questions which have not been but should be settled by this Court. *Sup. Ct. R.* 17.

Furthermore, Petitioners have failed to cite to this Court, nor have Respondents located any decision by any

other federal court of appeals, which is in conflict with the Fifth Circuit's decision in this matter. Petitioners have not located any decisions of this Court which conflict with the federal questions which Petitioners state arise in this cause of action.

The respected judges below based their decision on the accepted usual course of judicial proceedings, that is a review of the record to see if the evidence sufficiently supports the district court's judgment and whether or not the district court exercised sound judicial discretion in the admission of particular evidence. A right and fair result was reached by the court below.

As this Court has stated before, concurrent findings on questions of fact by the district court and circuit court of appeals will not be disturbed unless plainly without support in the evidence. *General Talking P. Corp. v. Western Electric Co.*, 304 U.S. 175 (1938) adhered to 305 U.S. 124, reh. den. 305 U.S. 675.

The record is replete with evidence to support the jury's verdict. This Court is not the place to review any alleged conflicts of evidence but to review those decisions and cases involving principles, the settlement of which are of importance to the public as distinguished from the parties. *National Labor Relations Board v. Pittsburg S.S. Co.*, 340 U.S. 498 (1951).

As the Rules of this Court state, review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). "'Special and im-

portant reasons imply a reach to a problem beyond the academic or the episodic.'" *supra* at 74.

Respondents respectfully submit that this case has been subject to a thorough and effective Federal Appellate review and there is no need for further review.

The record clearly supports the judgment of negligence, both ordinary and gross, under Texas Law. Petitioners are now attempting to cast this case in terms of assumption of the risk and/or contributory negligence. Assumption of the risk and contributory negligence imply informed consent. Nowhere in the record is there found any testimony that anyone, the Carltons, or other "patients" at the Health School were ever advised that people have died during a fast, particularly at the Shelton Health School.

Petitioners now are alleging that Carlton was "determined to die." The record is clear that at least four days prior to his death, Mr. Carlton was totally dependent on Dr. Vetrano for his welfare. He was too weak to physically resist any efforts to place him in an ambulance, if Vetrano had called one. Furthermore, his reasoning had become clouded due to the severe infection, malnutrition, and debilitation, Carlton was suffering during his final days at the Shelton Health Center.

Respondents are not denying that Carlton made a reasoned choice to undergo a fast at the Shelton Health School in San Antonio, Texas. However, Carlton did not look at the Health School as a place of final resort but simply as an alternative to be investigated, and if the Hygenic treatment was not successful, then he would have submitted to the colostomy.

Clearly, the jury did not believe the testimony of the "disinterested witness", Emmett Freez. The statement "do or die" could not have been uttered by a man who in the very words of the Petitioners was an "intelligent, educated, and mature businessman". (See Page 8 of Petition).

The record is absent of any requested instruction to the jury concerning assumption of the risk and contributory or comparative negligence. Under the Federal Rules of Civil Procedure, Petitioners should not be allowed to raise those issues now. *F. R. Civ. P.* 51.

Due to the findings of gross negligence, the jury obviously believed that Vetrano and Shelton had crossed the line between misfeasance and conscious indifference. In cases such as this, the attitudes and states of minds of the Defendants weigh very heavily. Thus, as the Court of Appeals of the Fifth Circuit has decided in similar fact situations, appellate courts are reluctant to read between the lines of the record. "We commit our trust to the jurors who saw and heard the witnesses". *Fielder v. Bosshard,* 590 F.2d 105 (5th Cir. 1959).

Plaintiffs did not bring an action for malpractice. To allege malpractice would give undue credence and status to the fasting practitioner. There is no such standard, there is no training facility, there is no testing of practitioners. These individuals are self-appointed and basically conduct their activities in accordance with their personal prerogatives.

Due to the lack of an established standard, Plaintiffs submitted the reasonable man standard. Defendants' trial attorneys were in agreement. (Tr. 1-123, 1-125). Dr. Vetrano's trial attorney stated that due to the absence of such

a standard, the Defendant's conduct should be weighed against that of reasonable man. (Tr. 1-123). Dr. Shelton's attorney agreed. (Tr. 1-125). There was no objection in accordance with Rule 51 of the Federal Rules of Civil Procedure to the submission of the issue of negligence of Dr. Vetrano.

Based on the record, the only standard applicable to measure Defendants' conduct was the reasonably prudent person. Dr. Downing, the chiropractor, testified that Dr. Vetrano and Dr. Shelton, through their use of prolonged fasting, were not practicing chiropractic. A careful reading of Dr. Downing's testimony reveals that fasting an individual with the sole intake of distilled water for a considerable period of time is definitely not within the practices and teachings of the science of chiropractic. (Tr. 2-296, 2-300). Furthermore, Dr. Downing was not aware of any chiropractors who conduct themselves in that matter. (Tr. 2-305). Furthermore, as Petitioners have pointed out, Dr. Downing did testify that it was beneath the standard of care of a chiropractor to recommend a diet of distilled water only for the treatment of ulcerative colitis. (Tr. 2-317).

Dr. Vetrano did recommend the fast for the treatment of Mr. Carlton's ulcerative colitis as set forth in Mr. Carlton's letter of July 30, 1978 to Dr. Vetrano:

> "Accordingly, my reservation form specifies no ending date for my health school stay; however, per your recommendation, I am tentatively thinking in terms of two months or so, depending on how things go with the fast." (Plaintiff's Exhibit No. 3).

Furthermore, Dr. Vetrano did ask Mr. Carlton to stop taking the drugs prescribed by his physician at least

three weeks prior to his entry into the Health School. (Tr. 1-48).

It was agreed by all parties and all experts who testified, that no practitioner of any school should allow a patient to deteriorate to a point of dehydration, malnourishment, and grave illness. All the medical doctors were in agreement that Carlton suffered from all three conditions on his admission to Baptist Memorial Hospital. Defendants' own expert, Dr. Scott, the fasting practitioner, stated that on admission to the Baptist Memorial Hospital, Mr. Carlton was critically ill.

> "This is a very very sick man. He is metabolically deranged, seriously, dangerously, perhaps critically. Metabolically deranged, meaning he is suffering from a mortal illness and it means his internal regulators are not sustaining his vital function well enough to preserve his health." (Tr. 3-650, lines 12-16).

Even Dr. Shelton, in his book *Fasting Can Save Your Life,* (See Plaintiff's Exhibit No. 32) stated:

> "He (the supervisor) carefully watches the faster in the day-by-day developments and *breaks the fast when his object has been obtained or before any danger to the faster has developed.*" (Tr. 3-681, lines 4-7). (Emphasis added.)

As this Court is aware, all of the standards of the experts, were superior to that of a reasonably prudent man. The higher the standard of care required by the defendant, the easier to prove liability. Here the Defendants' conduct did not even rise to the standard of the reasonably prudent man, the lowest standard of conduct that our society will permit in governing man's relationship to man. It is conclusive that the Defendants, from the testimony of all experts, failed to meet the lowest

"standard of care". See *Miles v. Meadows,* 309 S.W.2d 284 (Tex. Civ. App.-Dallas, no writ, 1958) at 287.

Gross Negligence

Respondents agree that in the State of Texas, *Burk Royalty Co. v. Walls,* 616 S.W. 2d 911 (Tex. 1981) is the controlling authority on gross negligence and exemplary damages.

The Texas Supreme Court has stated that the appellate standard in testing a jury finding of gross negligence test must be the same evidence test which should apply to any other fact issue. *supra* at 920.

> "The plaintiff has the burden to prove that the defendant was grossly negligent. If the jury finds gross negligence, the defendant has the burden of establishing that there is no evidence to support the finding. . . . The jury, after all, does not have to believe evidence that some care was exercised. When there is *some* evidence of the defendant's want of care and also *some* evidence of some care by the defendant, the jury finding of gross negligence through entire want of care resolves the issue, and the appellate court is bound by the finding and testing for legal sufficiency. *supra* at 920, 921.

The fact that Dr. Vetrano had previously supervised three (3) people who died from malnutrition, dehydration, debilitation and the effects thereof, was probative that Dr. Vetrano *knew* about the peril to which she was subjecting Carlton. Furthermore, the medical testimony that at least four (4) days prior to his death, Carlton was too weak to even leave his bed, established that he was totally subject to the will and control of Dr. Vetrano. To have allowed Carlton to fall into such a debilitated state and to have refused to call for medical assistance until the

eleventh hour, was a strong indication of *her want of care*, particularly in view of three (3) prior deaths from substantially the same causes and under identical circumstances. Furthermore, the fact that she would allow a living, vibrant individual, to be subjected to such pain and suffering and to waste away to the skeletal state, was also strong proof that she *did not care* about the safety and welfare of Mr. Carlton. (See Plaintiffs' Exhibit Nos. 9-11.)

While Dr. Vetrano alleged that she visited Carlton on a regular basis, her notes clearly point to conduct to the contrary. Furthermore, while she testified that she attempted to have Mr. Carlton break his fast, there was no record in her notes of such advice, though her own expert, Dr. Scott, indicated that it was of vital importance to make such a notation. More importantly, Mr. Carlton was at such a point of debilitation and extreme weakness, he could not have physically resisted Dr. Vetrano had she called an ambulance at any time. Dr. Vetrano did not have the right to gamble with Mr. Carlton's life on her theory that he could survive the crisis. Thus any attempts by the Petitioners to point to any evidence that Dr. Vetrano exercised some care is overshadowed by the overwhelming evidence to the contrary.

Her own expert, Dr. Scott, testified that patients must be seen at least once a day during the fast and more often if they are critically or seriously ill. (Tr. 3-630). As Dr. Vetrano's notes indicated, she consistently did not see Mr. Carlton for two to three days at a time. (Tr. 4-904).

As stated above, Dr. Vetrano did recommend a fasting program for the treatment of Mr. Carlton's disease. (See Plaintiffs' Exhibit No. 3). Thus, the focus of the

Fifth Circuit's decision is not misplaced as alleged by Petitioners. At no time was the possibility or risk of death ever disclosed to Carlton or the fact that other persons under Dr. Vetrano's supervision had died during fast at Shelton's Health School. Without this crucial information, Carlton could not have made a reasoned choice about the fast. The decision to continue the fast to the point of starvation and eventual death was that of Dr. Vetrano.

II.

The Court of Appeals Has Rendered a Decision In Accordance With the Federal Rules of Evidence.

During the testimony of Dr. Vincent Di Maio, Bexar County Medical Examiner, the autopsy reports of three (3) prior individuals who had died at Dr. Shelton's Health School were admitted into evidence. (Tr. 2-399, 400). These individuals were Fr. Armand John Gilbert, Keith V. Ellis and Joy Michelle Bristo. Dr. Vincent Di Maio had reviewed the autopsy reports and personally examined tissue slides which had been retained by the prior medical examiner for each of these three (3) persons. (Tr. 2-405-407). Fr. Armand John Gilbert died in 1973; Keith Ellis in 1974; Joy Michelle Bristo in 1977; and William R. Carlton in 1978. (Tr. 2-406). Thus, the period between the death of the first, Fr. Armand John Gilbert and Mr. Carlton was five (5) years. In the opinion of Dr. Vincent Di Maio, the state of health of all four (4) individuals were similar at the time of their death.

> "All of these people died as a result of dehydration, starvation, and they manifested the evidence at autop-

sy of their disease, starvation and dehydration." (Tr. 2-407, lines 3-5).

Three of the four had bronchial pneumonia at the time of their death.

"The last one, Ms. Bristo, had bronchial pneumonia. Mr. Ellis had bronchial pneumonia, and of course, Mr. Carlton had bronchial pneumonia." (Tr. 2-408, lines 4-6).

All four, including Carlton, had sustained extreme weight losses prior to the time of their death. (Tr. 2-409). All four had come from Shelton's Health School. (Tr. 2-411). At the time of his admission to Baptist Memorial Hospital, Carlton was described as a likely candidate for a heart attack. Fr. Armand John Gilbert appeared to have died from cardiac arrest. (Tr. 2-416). The first three had actually died at Shelton's Health School. (Tr. 2-417).

Based on the similarity of the conditions, Dr. Di Maio testified that in his opinion, the person who supervised the fast of all four of these people from 1973 to 1978, exhibited a gross neglect for their welfare and safety. (Tr. 2-422-2-423). There was sufficient and substantial similarity between the deaths of Gilbert, Ellis, Bristo, and Carlton; all had died due to complications, malnutrition, dehydration, and extreme weight loss, and these conditions occurred at the Shelton Health Center. (Tr. 2-443). Dr. Vetrano was the supervisor in charge during 1973 through 1978. (Tr. 3-826-830).

It has been repeatedly held that evidence of similar accidents is relevant in regards to issues such as the defendant's notice, magnitude of the danger involved, the defendant's ability to correct, the standard of care, and causation. *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334

(5th Cir. 1980); and *Jones and Laughlin Steel Corp. v. Matherne,* 348 F.2d 394 (5th Cir. 1965).

Only if there was *no* similarity of conditions between these prior deaths could this evidence be deemed inadmissible as a matter of law. *Morrison v. Wilkerson,* 343 F.Supp. 1319 (W.D. Miss. 1971).

> " 'If there is some similarity of conditions, the weight of that evidence would be in proportion to the evidence of similarity, the greater weight to be given where there is greater similarity and a lesser weight where the similarity is less' ". *supra* at 1326.

Where the issue is one of foreseeability or notice, evidence of what has actually been experienced in the same or controllable situations constitutes proof of the greatest probative value. *Gardner v. QHS, Inc.,* 488 F.2d 238 (4th Cir., 1971). While the evidence may be prejudicial, such prejudice is greatly outweighed by it probative value. *Fed. R. Evid.* 403. Virtually all evidence is prejudicial. Defendants have failed to show the prejudice is unfair. *Dollar v. Long Mfg. N. C., Inc.,* 561 F.2d 613 (5th Cir. 1977).

Generally, where negligence is an issue, prior failures concerning an allegedly hazardous condition are admitted as being probative of the Defendants' knowledge. Are not prior deaths under identical conditions indicative of hazardous conditions? Rule 404 (b) is not limited solely to products liability. Prior failures imputes knowledge and this knowledge, in turn, then operates as a standard against which can be tested the reasonableness of the Defendants' conduct with regard to the allegedly hazardous condition, or in this case, treatment. *Gilander v. Ford Motor Company,* 488 F.2d 839 (10th Cir. 1973) at 846.

Thus, the District Court exercised sound judicial discretion which has been upheld by the Fifth Circuit in that the evidence of other wrongful conduct by Dr. Vetrano was admissible for such other purposes as proof of motive, opportunity, intent, preparation, plan, knowledge, and causation. *Fed. R. Evid.* 404 (b).

Defendants have cited the case of *Garcia v. Aetna Cas. and Sur. Co.*, 657 F.2d 562 (5th Cir., 1981) in support of its contention that the prior deaths were inadmissible. In *Garcia*, the evidence of a prior fire was properly denied since the defendant introduced absolutely no evidence to show that the plaintiff had anything to do with the prior fire. A similar result was reached in the decision of *Smith v. State Fire and Cas. Co.*, 633 F.2d 401 (5th Cir. 1980). In *Smith*, the defendants attempted to introduce the evidence of five prior fires but failed to lay the proper predicate by submitting evidence to show that the plaintiffs had actually been involved in the fires. Thus in both *Garcia* and *Smith*, the Fifth Circuit correctly upheld the trial court's decision to refuse the admission of prior incidents since the moving party failed to produce evidence to show a connection with the party against whom the evidence was offered. Such connective evidence can be found in this record.

It is undisputed that all three (3) prior deaths occurred at the Shelton Health School. Furthermore, Dr. Vetrano was the director of Dr .Shelton's Health School and under the supervision of Defendant, Dr. Shelton, and was in full control and custody of its operations since 1965. (Tr. 1-47, 2-399, 2-339-340, 3-791-794). The record is uncontroverted that Dr. Vetrano was the supervisor responsible for the fasts of Fr. Armand John Gilbert, Joy

Bristo, and Keith Ellis as she was Carlton's. (Tr. 3-826-830). Thus, the cases of *Garcia* and *Smith* are not relevant to this case before this Court.

Petitioners are correct that on Page 382 of Volume II of the Transcript, testimony from Dr. Ruben Santos was read from deposition, that Dr. Santos had autopsied eight deaths from the Shelton Health School in about fifteen (15) years. However, no objection was made to that reading at the time it was offered. Furthermore, the trial court only allowed the details concerning the substantially similar deaths of Fr. Armand John Gilbert, Joy Bristo, and Keith Ellis into evidence.

III.

The Court of Appeals Has Not Rendered a Decision Which Will Inhibit Freedom of Choice, Research and Exploration.

Respondents respectfully submit that Petitioners are incorrect in their assertion that the judgments of the courts below were based on a disdain for the practice of fasting as the treatment for physical illness. (See Page 18 of Petition). The judgments of the courts below are based on the trial record and that record clearly showed that Dr. Vetrano "literally allowed Carlton to starve to death". (Opinion at Page 1332). While Petitioners submit and Respondents agree that the Federal Courts are not the appropriate forum to debate the virtues and vices of "fasting treatments", Petitioners are asking this Court to ignore the plethora of evidence of negligence and grant a writ of certiorari in order that the theories of the Petitioners can be further discussed.

The courts below are not criticizing Dr. Vetrano and Dr. Shelton for their theories of health care but their gross lack of attention to the basic human needs of Mr. Carlton during his stay at the Shelton Health School. Mr. Carlton did not intend to risk his life but *relied* upon Dr. Vetrano and Dr. Shelton to exercise their duties as ordinary reasonably prudent persons. Under the law, such was his right.

CONCLUSION

Because the judgment reached by the courts below is fair and just and Petitioners have failed to raise any substantial federal questions:

We respectfully submit that the Court should deny Petitioners' prayer for a Writ of Certiorari.

Respectfully submitted,

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